

SOUTHERN SAN JOAQUIN VALLEY WATER QUALITY COALITION

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VIA ELECTRONIC MAIL & U.S. MAIL

Kenneth Landau
Assistant Executive Director
**CENTRAL VALLEY REGIONAL
WATER QUALITY CONTROL BOARD**
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**RE: *DELTAKEEPER , ET AL. V. CALIFORNIA REGIONAL WATER QUALITY CONTROL
BOARD, ET AL. –SACRAMENTO SUPERIOR COURT CASE No.: 04CS00235*
PROPOSED RESOLUTION TO AMEND THE CONDITIONAL WAIVERS OF WASTE
DISCHARGE REQUIREMENTS FOR DISCHARGES FROM IRRIGATED LANDS WITHIN
THE CENTRAL VALLEY REGION**

Dear Mr. Landau:

The Southern San Joaquin Valley Water Quality Coalition (“SSJVWQC”) comments on the above-referenced matter, which was remanded for clarification by Court order and scheduled for consideration by the Central Valley Regional Water Quality Control Board (“Regional Board”) on September 15 and 16, 2005. I will comment in the order of the few issues I believe merit additional review.

I. Beneficial Uses:

Page 3 of the Draft Attachment A2 includes a list of five ways that beneficial uses can apply to waters of the state. I concur with the list, however, Item number four on this list overstates a designation mechanism. It states:

“Beneficial uses can be attributed by operation of law. (See, e.g. 33 U.S.C.A. § 1251(a)(2) (FWPCA § 101(a)(2)). The federal CWA requires that ‘waters of the United States’ be protected for the beneficial uses of fishing and swimming.”

This overstates the Clean Water Act (“CWA”) requirements. The use of the term “attributed” is unclear. This term is not valid pursuant to either the CWA or Porter-Cologne Water Quality Control Act (Wat. Code § 13000, et seq.) (“Porter-Cologne”). The language implies that the CWA designates all waters of the United States for fishing and swimming uses. This is not the case. The CWA only provides “it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife provides for recreation in and on the water be achieved...” (33 U.S.C. § 2151(a)(2).) The CWA fully delegates to States the role of designating such beneficial uses and developing applicable water quality criteria. (33 U.S.C. § 1313.) The CWA does not designate beneficial uses for any water bodies.

Section 131.10 of Title 40 of the Code of Federal Regulations also provides that “Each State must specify appropriate water uses to be achieved and protected” taking into consideration numerous uses and values of water. (40 C.F.R. § 131.10.) These regulations, therefore, do not support the conclusion that fishing and swimming uses are designated for all waters of the United States. The regulations provide that the Environmental Protection Agency will merely review a state’s proposed water quality standards. It is the State’s responsibility to determine whether fishing and swimming uses should be expressly designated.

II. Constructed Agricultural Drains

A. The Draft defines constructed agricultural drain as “a water body that conveys drainage from agricultural operations and was constructed in a location where no natural water body (including intermittent swales, etc.) existed prior to the construction activity. Every other water body is a ‘stream’ under the terms of the tributary rule, whether it has been modified for agricultural discharge conveyance, flood control, water supply, or other purposes or not.”

The definition is factually unsupportable and significantly more restrictive than existing State Board policy, as reflected in State Board Resolution No. 88-63, which states, such “systems designed or modified for the primary purpose of conveying or holding agricultural drainage waters...” This Board policy definition, therefore, is not

limited only to locations where no natural water body ever existed. There are many constructed agricultural drains throughout the Central Valley located in or across areas where, during parts of the year, some water historically appeared. All such areas cannot be considered “streams” and, therefore, cannot be the basis of applying the CWA and Porter-Cologne. The definition of constructed agricultural drain must, therefore, be deleted and the determination of whether a waterway is a constructed agricultural drain be made on a case-by-case basis taking into consideration the policy set forth in the State Board Resolution No. 88-63 and other appropriate site-specific factors.

B. We do fully concur with the language on Page 3, which states, “the tributary rule applies only to ‘streams’ and not to ‘constructed agricultural drains’.” We also agree that the Regional Board may have authority to expressly designate beneficial uses in such waters.

C. In July, we wrote to your Deputy Attorney General representative, Deborah Barnes, on this subject and stated,

First, the State Board, in its Water Quality Order No. 2002-0016 at pp 4-6, has indicated that the Tributary Rule does not apply to constructed agricultural drains, and I believe Deborah, at the hearing, you had indicated this is the State Board’s position in response to the Judge’s oral inquiry/statements.

Therefore, the general rule forecloses the Tributary Rule from imposing Water Quality Orders (“WQOs”) to constructed agricultural drains. This, of course, does not prevent the Regional Board from specifically designating beneficial uses and water quality objectives for specific particular constructed agricultural drains by adopting them into the Regional Board sub-basin, basin plans. The Regional Board has specifically so designated WQOs in the Sacramento River and San Joaquin River Sub-basin at Table II-1, in respect to the Delta Mendota-Canal. The Regional Board has, however, not so designated any constructed agricultural drains in the Tulare Lake Basin Basin Plan, therefore, neither the Tributary Rule nor the Basin Plan provide authority for imposing water quality objectives for constructed agricultural drains in the Tulare Lake Basin.

The Tulare Lake Basin itself has a very different relationship to its source waters than the Delta or the San Francisco Bay have relative to the Sacramento River and San Joaquin Rivers in that sub-basin. The Tulare Lake Sub-

basin is a closed basin with terminal waters. The Tulare Lake Basin does not have designated water quality objectives; therefore, there are no WQOs which the Tributary Rule could even arguably impose up into the constructed agricultural conveyance and drainage channels.

It, therefore, appears clear that the Tributary Rule cannot be read so as to impose water quality objectives in receiving waters up into the constructed agricultural drains/conveyances, unless the Regional Board specifically so designates them in the appropriate sub-basin, basin plans.

III. Agricultural Dominated Water Bodies

A. The proposed policy also fails to adequately discuss “agricultural dominated water bodies.” Agricultural dominated water bodies are usually characterized by the fact that it is the agricultural discharges which support beneficial uses in those water bodies. Without the agricultural discharge, there would be insufficient flow to support such beneficial uses. The Regional Board has acknowledged that beneficial uses of agricultural dominated water bodies should be further evaluated in light of their unique character. The Regional Board has identified the need to develop a strategy to address agricultural dominated water bodies, including identification of agricultural dominated water bodies and evaluation of appropriate beneficial uses, site-specific objectives, and/or basin-wide objectives. The Regional Board, however, has not yet pursued the development of this strategy, which now seems imperative.

B. In our July letter, we wrote as follows, and again offer these thoughts:

The only remaining issue to be yet resolved by the Regional/State Boards has to do with drains/conveyances which are dominated by agricultural drainage but may be or have been a natural watercourse having a significant natural flow, but which are now dominated by agricultural drainage. There may be a number of factors that should be considered when addressing such issues (i.e., 1) natural watercourses versus significantly altered watercourses to accommodate drainage; 2) extent of natural versus drain flow; 3) extent of natural flow originating upstream of the agricultural drainage; 4) the presence of any water quality objectives/beneficial use designations applicable to the natural drainage upstream of its dominance by agricultural drainage.

IV. Protection of Downstream Uses

Page 4 of Draft Amendment A2 also overstates the protection of beneficial uses. It states, “It must also be noted that the Receiving Water Limitations protect the beneficial uses of all water bodies within the Central Valley Region that ultimately receive dischargers’ waste. Therefore, regardless of the beneficial uses that apply to the water body that directly receives the waste discharge, dischargers must also ensure that their discharges do not impact the beneficial uses of any downstream water bodies.”

The Conditional Waivers apply only to all surface waters of the state, rather than “all water bodies within the Central Valley Region.” (See, e.g., Regional Board Resolution No. R5-2003-0105. Similarly, the draft itself, makes clear that the “Conditional Waivers regulate discharges of waste from irrigated lands to all surface ‘waters of the state’ ...” Consequently, reference to “all water bodies within the Central Valley Region,” is overbroad and should be removed.

Additionally, the conclusion that discharges may not “impact” downstream beneficial uses is also overbroad. The Clean Water Act and the Water Code require prevention of activities that cause or contribute to violations of water quality objectives, but do not preclude all activities that may “impact” beneficial uses. The term “impact” is far too broad and moreover could refer to both positive and negative impacts or also to changes that do not result in any impairment.

Respectfully submitted,

/s/ William J. Thomas

WILLIAM J. THOMAS

On behalf of the

SOUTHERN SAN JOAQUIN VALLEY

WATER QUALITY COALITION

cc: Art Baggett
Robert Schneider
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